SEPARATE STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers

The foregoing Notice tentatively concludes that wireline broadband Internet access services — whether provided over a third party's facilities or self-provisioned facilities — are information services subject to regulation under Title I of the Act. I believe that the analysis set forth in the Notice represents the most straightforward and sensible interpretation of the relevant statutory provisions, as I previously explained in the Section 271 proceeding that gave rise to this Notice.[1] I also believe that classifying incumbent LECs' Internet-access services as information services will serve important public policy goals by promoting a more flexible regulatory framework for these offerings and enabling the Commission to develop a more consistent regulatory approach across technological platforms.

As the Notice recognizes, classifying incumbent LECs' Internet-access services as information services would raise important questions regarding the applicability of existing retail and wholesale regulations. On the retail side, since many Title II obligations are premised on the provision of a telecommunications service, concluding that Internet-access services include only a "telecommunications" component — rather than a distinct "telecommunications service" — might lead us to determine that such Title II duties do not apply or apply only in part. While some might reflexively worry that the removal of Title II regulation would harm consumers, it is important to recognize that the vast majority of Internet access services purchased today *already* are unregulated.[2] All non-LEC broadband providers (such as cable modem and satellite broadband providers) and non-LEC narrowband ISPs (such as market leader America

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[1] *See* Separate Statement of Commissioner Kathleen Q. Abernathy, *Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri*, CC Docket No. 01-194, FCC 01-338 (rel. Nov. 16, 2001) ("*SBC MO/AR Order*").

[2] In addition, even absent an ultimate finding in this docket that incumbent LECs' Internet access services are information services, it is by no means clear that such services would be subject to retail regulation under Title II. In some contexts, the Commission has appeared to conclude that incumbent LECs' Internet access services include a distinct telecommunications service. *See, e.g.*, *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as Amended; 1998 Biennial Regulatory Review — Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access, and Local Exchange Markets*, Report and Order, 16 FCC Rcd 7418 (2001) ("*CPE Unbundling Order*") (assuming that the provision of bundled services includes a separate telecommunications service and therefore requires contribution to federal universal service mechanisms). In other contexts, however, the Commission has appeared to take the contrary view that the identification of an information service signifies that the provider *uses* — but does not separately *provide* to end users — telecommunications. *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (1998); *see also SBC MO/AR Order*, ¶¶ 81-82 (concluding that Commission precedent has not squarely resolved the appropriate statutory classification of ILECs' Internet access services).

Online and the thousands of other ISPs) provide service unconstrained by Title II. Moreover, it appears that the robustly competitive market for ISP services gives providers ample incentive to engage in consumer-friendly practices and punishes providers that fail to do so. For example, major ISPs have developed detailed policies for protecting customer privacy, irrespective of government mandates. In any event, the Notice appropriately seeks comment on the implications of an information-service designation on Title II regulation, and I am confident that, if market failures are identified, the Commission can and will intervene to the extent necessary to protect consumers.

On the wholesale side, classifying incumbent LECs' Internet-access services as information services should not have any automatic consequences. Under our *Computer Inquiry* precedents, incumbent LECs are required to make available to unaffiliated ISPs a broadband telecommunications functionality on an unbundled and nondiscriminatory basis. While the Notice seeks comment on whether those requirements should be altered, or even eliminated, there should be no confusion as to their current applicability. Moreover, my willingness to consider changes to this regime — which has existed largely without alteration notwithstanding very significant competitive and technological developments in recent years — does not reflect any predisposition toward any particular outcome.

I support inquiring about changes to our regime for several reasons, not the least of which is that Congress directed the Commission to undertake such inquiries bienially to ensure that our regulations remain necessary.[3] Even absent a statutory mandate, I would want to examine the justifications for our current rules, because it is worth exploring the possibility of developing a more streamlined, market-based approach to wholesale regulation. But I am equally mindful of the fact that our *Computer II/III* rules played a key role in fostering a robustly competitive ISP market in which consumers can choose from a wide range of providers. Thus, while I intend to examine the record with an eye toward streamlining wholesale regulations where possible, I am committed to preserving regulations to the extent necessary to safeguard competition and consumer choice. Moreover, because the Commission cannot adequately assess the need for regulatory intervention without taking account of our analysis of market dominance in the recently released *Incumbent LEC Broadband Services* proceeding[4] — particularly if we

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[3] *See* 47 U.S.C. § 161 (mandating biennial review of Commission regulations); *see also id.* § 160 (directing the Commission to forbear from enforcing unnecessary regulations or statutory provisions). The Commission examined and modified the *Computer II/III* obligations in its 1998 Biennial Review. *See Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Review — Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 95-20, 98-10, Report and Order, 14 FCC Rcd 4289 (1999), *recon.*, 14 FCC Rcd 21628 (1999); *see also Further Comment Requested To Update and Refresh Record on Computer III Requirements*, Public Notice, CC Docket Nos. 95-20, 98-10 (rel. Mar. 7, 2001).

[4] *Review of Regulatory Requirements for Incumbent LEC Broadband Services; SBC Petition for Expedited Ruling That It Is Non-Dominant in Its Provision of Advanced Services and for Forbearance from Dominant Carrier Regulation of These Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, FCC 01-360 (rel. Dec. 20, 2001).

identify a distinct wholesale market in that rulemaking — I will closely review the record in both proceedings before reaching any conclusions about the appropriate scope of wholesale regulation of the broadband telecommunications functionality.